



In the Matter of:

MARK DUNCAN,

ARB CASE NO. 99-011

COMPLAINANT,

ALJ CASE NO. 97-CAA-12

v.

DATE: JUL 10 2000

**SACRAMENTO METROPOLITAN AIR
QUALITY MANAGEMENT DISTRICT,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mark Duncan, *pro se*, Shingle Springs, California

For the Respondent:

Kenneth Swenson, Esq., Matthew D. Evans, Esq., *Duncan, Ball, Evans & Ubaldi*,
Sacramento, California

ORDER

Complainant Mark Duncan filed a "Motion to Accept New Evidence Into the Record and Motion to Grant a Thirty-Day Extension for the Filing of the Initial Brief." This motion requested the Administrative Review Board to accept the following new evidence into the record: 1) transcripts of the arbitration proceedings which arose from Duncan's discharge from employment by the respondent Sacramento Metropolitan Air Quality Management District (the District), including the exhibits presented during those proceedings; 2) a May 13, 1999 complaint of blacklisting against the District and associated attachments previously filed with the Board; and 3) a bank statement showing payment of check #2008 from Duncan to the District, covering the cost of his alleged misuse of a District cellular phone. Duncan subsequently filed a "Motion to Expand the Initial Brief Page Limitation from Thirty to Fifty Pages."

In response to Duncan's request to supplement the record, the District filed a "Statement of Provisional Non-Opposition to Complainant Duncan's Motion to Supplement the Record" (Statement of Provisional Non-Opposition). The District stated that it does not oppose the motion to supplement the record provided that the Board also admits into evidence the Arbitration Opinion and Award that resulted from the arbitration proceeding. The District subsequently filed a "Motion to Reopen the

Record to Supplement it with the Arbitration Opinion and Award Concerning Termination of Complainant Mark Duncan; and Declaration of Kenneth L. Swenson in Support Thereof (District's Motion to Reopen the Record).

On June 13, 2000, the Board issued an Order: 1) allowing Duncan to file a response to the District's Motion to Reopen the Record on or before June 27, 2000; 2) remanding the blacklisting complaint to the San Francisco Occupational Safety and Health Office for investigation as provided in 29 C.F.R. §24.4; and 3) denying Duncan's motion to reopen the record to introduce the bank statement showing payment of check #2008. On June 27, 2000, Duncan responded to the District's Motion to Reopen the Record stating that he did not oppose the District's request to add the arbitration decision to the record in this case.

As indicated in our June 13th Order, when considering a motion to reopen the record to admit new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, (as did the Board's predecessor, the Secretary), which provides:

Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

29 C.F.R. § 18.54(c). *See, e.g., Lassin v. Michigan State University*, 93-ERA-31, Fin. Dec. & Ord. (June 29, 1995). The ALJ initially closed the record in this case on March 26, 1998. *See* Order to Show Cause (April 13, 1998). However, by order dated May 7, 1998, the ALJ reopened the record upon the District's motion to allow the District to submit into evidence a copy of an arbitrator's decision dated March 25, 1998, concerning Duncan's challenge of a five-day suspension the District had imposed in March 1997. The District also asserts in its Statement of Provisional Non-Opposition that the ALJ issued an order on July 7, 1999, again reopening the record to permit Duncan to introduce ALJX9, "transcript of the May 14, 1998 arbitration proceeding before arbitrator Geraldine M. Randall." Although an examination of the record did not reveal the ALJ's July 7, 1999 order, ALJX9 is, in fact, in the ALJ record. The ALJ issued his Recommended Decision and Order on October 16, 1998.

The Arbitration Award the District seeks to introduce into evidence was not issued until November 23, 1998. Thus, it was not available prior to the closing of the record or the issuance of the ALJ's decision. The arbitration transcripts and exhibits Duncan seeks to introduce first became available after the ALJ closed the record, but apparently before the ALJ issued his decision.¹

Because "strong federal policies" favor collectively bargained arbitration agreements, the ARB generally will consider arbitration proceedings and decisions in cases concerning alleged

^{1/} Both the District and Duncan successfully petitioned the ALJ to reopen the record to include additional evidence after he initially closed the record. Duncan does not explain why he did not request the ALJ to reopen the record to accept the transcripts and exhibits so that the ALJ could initially rule upon the request and, if he granted it, could consider the transcripts and exhibits in rendering his recommended decision and order. Allowing the ALJ initially to consider this request would certainly be the preferred course of action.

discrimination under an employee protection provision. *See Lassin v. Michigan State University*, 93-ERA-31, Fin. Dec. & Ord. (June 29, 1995), *quoting Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 (11th Cir. 1987). Thus, we GRANT Duncan's motion to reopen the record and introduce the arbitration transcripts and exhibits as well as the District's motion to reopen the record to introduce the arbitration decision.

We next consider Duncan's "Motion to Expand the Initial Brief Page Limitation from Thirty to Fifty Pages." Duncan states in his motion that he requires "the additional pages to adequately incorporate new evidence into my initial brief." We generally disfavor motions to expand the page limitations as history dictates that most cases can be fully and sufficiently briefed in 30 pages. In fact, the most effective and persuasive briefs are concise and to the point. Furthermore, in this case, we have remanded the blacklisting complaint to the OSHA office in San Francisco for investigation and have denied Duncan's motion to introduce check # 2008 into the record. Thus, it will be unnecessary for Duncan to brief these issues. Accordingly, we DENY Duncan's "Motion to Expand the Initial Brief Page Limitation from Thirty to Fifty Pages," but we will permit Duncan to file an initial brief not to exceed 35 pages.

The following briefing schedule is established in this case. Complainant may file an initial brief, not to exceed thirty-five (35) double-spaced typed pages, on or before August 11, 2000. Respondent may file a reply brief, not to exceed thirty (30) double-spaced typed pages, on or before September 10, 2000. Complainant may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten (10) double-spaced typed pages, on or before September 27, 2000.

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. *See, e.g., Fed. R. Civ. P. 7(b).*

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1¼ inch top and bottom margins, printed on 8½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted.

An original and five copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C., 20210.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R Dunlop
General Counsel

Note: Questions regarding any case pending before the Board should be directed to the Board's staff assistant, Ernestine Battle. Telephone: (202) 219-9039 Facsimile: (202) 219-9315